

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1376
77-1404

77-1376

To be argued by
Charles L. Weintraub

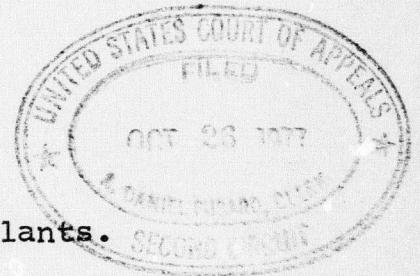
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

vs.

MAXIMINO TORRES, and
AQUILES VARGAS,

Defendants-Appellants.



On Appeal from the United States District Court
for the Eastern District of New York

BRIEF FOR DEFENDANTS-APPELLANTS

Charles L. Weintraub
Attorney for Defendants-Appellants
1345 Avenue of the Americas
New York, New York 10019
(212) 582-9300

77-1376
77-1404

To be argued by
Charles L. Weintraub

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

vs.

MAXIMINO TORRES, and
AQUILES VARGAS,

Defendants-Appellants

On Appeal from the United States District Court
for the Eastern District of New York

BRIEF FOR DEFENDANTS-APPELLANTS

Charles L. Weintraub
Attorney for Defendants-Appellants
1345 Avenue of the Americas
New York, New York 10019
(212) 582-9300

ERASE

COTTON CONTENT

TABLE OF CONTENTS

Preliminary Statement	1
Statement of Facts	2
Argument	3
I. Agent Crawford's Knowledge was not Sufficient to Establish Probable Cause to Search Appellant's Car.	3
A. Even the Search of a Car on the Public Highway must be based upon Probable Cause	3
B. The Knowledge of the Other Agents should not be Imputed to Agent Crawford.	4
C. Agent Crawford Lacked Probable Cause to Search	7
II. The Collective Knowledge of the Agents was not Sufficient to Support Probable Cause	8
III. Conclusion	11

MILLER'S BALLS

TABLE OF CITATIONS

CASES

<u>Carrol v. United States</u> , 267 U.S. 132 (1925).	4
<u>Chambers v. Maroney</u> , 399 U.S. 42 (1970).	4
<u>Coolidge v. New Hampshire</u> , 403 U.S. 433 (1971).	3, 4
<u>Mapp v. Ohio</u> , 367 U.S. 643 (1961).	6
<u>Moreno-Vallejo v. United States</u> , 414 F.2d 901 (5th Cir. 1969), <u>cert. denied</u> , 400 U.S. 841 (1970).	7
<u>Texas v. White</u> , 423 U.S. 67 (1975).	4
<u>United States v. Canieso</u> , 470 F.2d 124 (2d Cir. 1972). . .	4
<u>United States v. Del Porte</u> , 359 F. Supp. 969 (S.D.N.Y.), <u>aff'd</u> , 483 F.2d 1399 (2d Cir. 1973).	6
<u>United States ex rel Labelle v. La Vallee</u> , 517 F.2d 705 (2d Cir. 1975).	4
<u>United States v. Nieto</u> , 510 F.2d 1118 (5th Cir.), <u>cert. denied</u> , 399 U.S. 918 (1970).	7
<u>United States v. Rosario</u> , 543 F.2d 6 (2d Cir. 1976).	4
<u>United States v. Santana</u> , 485 F.2d 365 (2d Cir. 1973). . . .	8,9,10
<u>United States v. Tramunti</u> , 513 F.2d 1087 (2d Cir. 1975). . .	10
<u>United States v. Vasquez</u> , 534 F.2d 1142 (5th Cir. 1976), <u>cert. denied</u> , -- U.S. -- (1977).	6
<u>Whitely v. Warden of Wyoming Penitentiary</u> , 401 U.S. 560 (1971).	5
<u>Williams v. United States</u> , 308 F.2d 327 (D.C. Cir. 1962). .	4

STATUTES

Title 21, United States Code, Section 846	1
Title 21, United States Code, Section 841	1
Title 18, United States Code, Section 4205(b)(2).	2

MILLERS FALLS
ERASE
COTTON CONTENT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA,

Appellee,

vs.

MAXIMINO TORRES, and
AQUILES VARGAS,

Defendants-Appellants.
-----X

:
: Docket Nos.
: 77-1376 & 77-1404

BRIEF FOR THE DEFENDANTS-APPELLANTS

PRELIMINARY STATEMENT

Maximino Torres and Aquiles Vargas appeal from judgments of conviction entered on June 27, 1977, in the United States District Court for the Eastern District of New York, after each defendant plead guilty before the Honorable Thomas C. Platt, United States District Judge.

Indictment number 77CR203 charged each defendant with one count of conspiracy and one count of possession with intent to distribute a narcotic drug in violation of Sections 846 and 841 of Title 21, United States Code.

On June 27, 1977, a hearing to suppress the narcotics was conducted before the Honorable Thomas C. Platt and after the denial of the motions to suppress, each defendant-appellant entered a plea of guilty to Count Two of the indictment, possession with

intent to distribute, preserving the denial of the motions to dismiss for appellate review. On July 28 , 1977, each defendant was sentenced to the custody of the Attorney General for a period of five years pursuant to Title 18, United States Code, Section 4205(b) (2) and a special parole term of ten years.

Both appellants are incarcerated pending this appeal.

STATEMENT OF FACTS

On March 31, 1977, a confidential informant working with the Drug Enforcement Administration (hereinafter DEA) entered a two-family house located at 467 Pine Street, Brooklyn, New York, (Tr. 12, 13, 25). Later that day he informed DEA agents that he had purchased heroin from William Rodriguez; that Rodriguez had additional heroin to sell; and that Rodriguez would try to sell the additional heroin within a short time (Tr. 13, 14). While this information was disclosed to Agent Whalen, Group Supervisor White, an undercover agent and possible one other agent (Tr. 14), no where in the transcript is there any testimony or even an allusion to Agent Whalen or any other agent passing this information to Agent Crawford prior to his conducting the search at issue.

About two hours later surveilling agents observed the appellants enter 467 Pine Street and emerged carrying a brown paper bag (Tr. 17, 18, 59-61, 82, 97). Significantly, the

EZ ERVASE
COTTON CONTENT

the appellants were not identifiable as known narcotics dealers by the agents (Tr. 75). The appellants drove away from that location and were followed by several DEA agents (Tr. 19, 89-91). After following a somewhat circuitous route, Agents Whalen and Crawford pulled alongside, ordered the appellants to stop and approached their vehicle (Tr. 19-20, 98-101). Agent Whalen asked the driver, Mr. Vargas, for identification and he produced his driver's license and the car registration (Tr. 20-21). Agent Crawford asked Mr. Torres for identification and was shown his driver's license, social security card, and some other papers from his wallet (Tr. 102). Thereafter, Agent Crawford opened the glove compartment of the car and removed a brown paper bag. He looked inside of the bag and found approximately one pound of heroin (Tr. 102). Thereafter Agent Whalen instructed Agent Crawford to place Mr. Torres under arrest. (Tr. 54).

ARGUMENT

I. AGENT CRAWFORD'S KNOWLEDGE WAS NOT SUFFICIENT
TO ESTABLISH PROBABLE CAUSE TO SEARCH APPELLANT'S
CAR

A. EVEN THE SEARCH OF A CAR ON THE PUBLIC HIGHWAY
MUST BE BASED UPON PROBABLE CAUSE

The general rule that warrantless searches are per se unreasonable, Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971), has been somewhat relaxed when the search involves

an automobile operated on the public highways. Texas v. White, 423 U.S. 67 (1975); Chambers v. Maroney, 399 U.S. 42 (1970); Carrol v. United States, 267 U.S. 132 (1925). Nevertheless, the basic requirement that any search and seizure must be predicated upon probable cause has remained intact. "[I]f the search and seizure without a warrant are made upon probable cause. . . that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid." Carroll v. United States, supra, at 149; see also Coolidge v. New Hampshire, 403 U.S. 443 (1971).

B. THE KNOWLEDGE OF OTHER AGENT SHOULD NOT
BE IMPUTED TO AGENT CRAWFORD

This Court has held that in determining the validity of an arrest, the collective knowledge of a large metropolitan police department may be imputed to the arresting officer. United States v. Rosario, 543 F.2d 6 (2d Cir. 1976); United States ex rel Labelle v. La Valle, 517 F.2d 705, 753 (2d Cir. 1975), cert. denied, 423 U.S. 1062 (1976); United States v. Canieso, 470 F.2d 124 (2d Cir. 1972). The rationale for the rule, however, has been stated in an opinion quoted for that proposition by the Court in United States v. Canieso, supra. In Williams v. United States, 308 F.2d 327, 328 (D.C. Cir. 1962), now Chief Justice Burger held:

MILLERS FALLS

that in a large metropolitan police establishment the collective knowledge of the organization as a whole can be imputed to an individual officer when he is requested or authorized by superiors or associates to make an arrest. The whole complex of swift modern communication in a large police department would be a futility if the authority of an individual officer was to be circumscribed by the scope of his first hand knowledge of facts concerning a crime or alleged crime.

When the police department possesses information which would support an arrest without a warrant in the circumstances, the arresting officer, if acting under orders based on that information, need not personally or first hand know all the facts. (emphasis added).

The reason for the rule is, therefore, the practical recognition that a large police force cannot function effectively unless officers are permitted to rely upon information or authorization from their superiors or brother officers. See also, Whitely v. Warden of Wyoming Penitentiary, 401 U.S. 560, 568 (1971), ("certainly police officers called upon to aid other officers in executing arrest warrants are entitled to assume that the officers requesting aid offered the magistrate the information requisite to support an independent judicial assessment of probable cause.") When, however, no authorization to arrest or search has been communicated to the agent conducting the search and specific facts relevant to a determination of probable cause have likewise not been communicated to him, probable cause should be determined based

upon the information available to the searching agent. See United States v. Del Porte, 359 F.Supp. 969, 974 (S.D.N.Y.), aff'd, 483 F.2d 1399 (2d Cir. 1973).

Certainly, to uphold a search based upon information which was not communicated to the agent when the agent was not specifically authorized to take such action, and therefore cannot be said to be relying upon the judgment and supporting knowledge of his fellow agents, is to invite law officers to act in derogation of the Fourth Amendment in the hope that the collective knowledge of the department will support their actions. Thus, the prophylactic effect of the exclusionary rule will be virtually eliminated in a large class of cases. And, without the exclusionary rule "the assurance against unreasonable federal searches and seizures would be 'a form of words,' valueless and undeserving of mention in a perpetual character of inestimable human liberties,. . ." Mapp v. Ohio, 367 U.S. 643, 655 (1961).

Appellants recognize that the Fifth Circuit has followed a rule of "minimal communication" in this area. That is, collective knowledge will be considered when there has been "minimal communication" among the officers. United States v. Vasquez, 534 F.2d 1142, 1145 (5th Cir. 1976), cert. denied, U.S. (1977);

United States v. Nieto, 510 F.2d 1118, 1120 (5th Cir.), cert. denied, 399 U.S. 918 (1970); Moreno-Vallejo v. United States, 414 F.2d 901, 904 (5th Cir. 1969), cert. denied, 400 U.S. 841 (1970). The "minimal communication" rule should be rejected because absent specific authorization to search, it invites constitutional abuses as great as when there has been no communication among the officers.

C. AGENT CRAWFORD LACKED PROBABLE CAUSE
TO SEARCH

The agent who conducted the search in the instant case was not present when the confidential informant was debriefed. He apparently had never been informed that the informant purchased heroin on March 31, 1977, that there was additional heroin in 467 Pine Street or that the heroin would likely be sold in the near future.

Therefore, when Agent Crawford began the search of the car, prior to being instructed by Agent Whalen to make the arrest (Tr. 54), all he based his actions upon were that the appellants, previously unknown to the Agents, had exited 467 Pine Street carrying a brown paper bag and drove away in a confused manner. Considering these facts in conjunction with the search occurring in broad daylight after each appellant had produced proper iden-

MILLERS FALLS

-7-
ERASE

COTTON CONTENT

MILLERS FALLS
15-7-1949
tification, it is apparent that Agent Crawford lacked sufficient facts to permit a man of reasonable caution to believe that the car contained contraband. Brinegar v. United States, 338 U.S. 160, 175-76 (1949).

II. THE COLLECTIVE KNOWLEDGE OF THE AGENTS WAS NOT SUFFICIENT TO SUPPORT PROBABLE CAUSE

Even if this Court should determine that the cumulative knowledge of the agents involved in this case should be considered in determining whether probable cause existed, it is submitted that even this knowledge is not sufficient to support this search.

The facts known to the agents in the aggregate are remarkably similar to the fact pattern in United States v. Santana, 485 F.2d 365 (2nd Cir. 1973). In Santana, an officer with the New York Joint Task Force had under surveillance the La Concha Restaurant which was known to be a meeting place for individuals engaged in narcotics trafficking. Late in the evening, the defendant and a companion were observed to drive up to the restaurant and illegally double park. Both individuals entered the restaurant and returned with the defendant carrying a brown paper bag. The officer involved recognized the defendant as a person who had been identified in police files as among the top one hundred narcotics traffickers in New York. The officer had also been told

E Z E R A S E

COTTON CONTENT

by an informant that the defendant was heavily engaged in narcotics activities. The defendant and his companion then drove to an apartment building nearby, again double parked the car, and entered the building. Approximately ten minutes later the defendant came out of the building carrying another brown paper bag. After the defendant re-entered his vehicle, the police officer approached the car and asked to see the defendant's license and registration. Defendant opened the door, stepped out of the car, at which point the officer pushed the car door the rest of the way open, and stepped between the door and the car. He observed a plastic bag filled with white powder inside the car.

The Court held that the officer had reasonable suspicion which justified the stop and questioning of the defendant, and therefore provided a proper basis for the plain view sighting of the narcotics. It is significant that the Government recognized that the facts in Santana were not sufficient to support probable cause to search the vehicle and therefore conceded that issue. Id. at 367.

In the instant case, the agents observed the appellants in broad daylight enter a building where they believed narcotics were located and exit carrying a brown paper bag. Neither appellant

was known to the agents as someone involved in the narcotics trade. Appellants drove away in a somewhat erratic course, however, they did not speed, run red lights, or attempt to escape when asked to stop by the agents. Moreover, they produced proper identification when asked to do so.

Certainly, the fact that in Santana the observations took place at night and involved one of the top one hundred narcotics traffickers more than offsets the fact that in the instant case narcotics were known to be in the premises and the appellants drove away in an erratic manner.

It is submitted that the agents in the instant case had sufficient knowledge to stop the appellants to ask for proper identification and to question them about their activities, but they did not have probable cause to conduct a warrantless search. Compare United States v. Santana, supra, with United States v. Tramunti, 513 F.2d 1087, 1100-05 (2nd Cir. 1975).

CONCLUSION

For the above-stated reasons, the appellants submit that the order of the District Court denying the motion to suppress should be reversed.

Respectfully submitted,

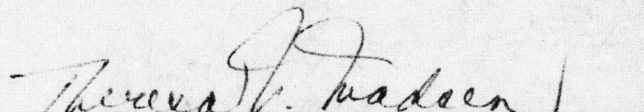
CHARLES L. WEINTRAUB
Attorney for Defendant-Appellants
1345 Avenue of the Americas
New York, New York 10019
(212) 582-9300

STATE OF NEW YORK)
)
COUNTY OF NEW YORK) SS:

THERESA V. MADSEN, being duly sworn, deposes and
says:

Deponent is not a party to the action and is over
18 years of age and resides at 128 Edgewood Ave., Colonia,
New Jersey.

On October 20, 1977, deponent mailed the within
Brief ^{and appendix} for Defendants-Appellants upon the Office of the United
States Attorney, Eastern District of New York, 225 Cadman Plaza
East, Brooklyn, New York, by depositing a true copy of same
enclosed in a post-paid properly addressed wrapper by certified
mail, return receipt requested.


THERESA V. MADSEN

Sworn to and subscribed before
me this day of , 1977.



STEVEN A. DELIBERT
NOTARY PUBLIC, State of New York
No. 24-4515200
Qualified in Kings County
Commission Expires March 30, 1979